

COMMENT

IMPLEMENTING A TAINT TEST TO ADDRESS THE PROBLEMS RAISED BY COMPELLED DISCLOSURE

FRANCIS E. MCGOVERN*

Robert O'Neil on the one hand¹ and Paul Carrington and Traci Jones on the other² form the conceptual bookends to my thoughts upon reading the series of articles in this symposium. Professor O'Neil suggests that there are a number of significant drawbacks to allowing formal discovery of the research results of the scholarly community:

- (1) denying "control of the reporting and disclosure process";
- (2) hampering "the research process";
- (3) rushing partial or premature disclosure of research that is still in process; and
- (4) making disclosures of confidential information.³

Others, such as Professors Wiggins and McKenna, add to the list of negative repercussions of untrammelled adversarial discovery "the economic and temporal demands of subpoenas,"⁴ the detrimental effect on future research, and "reputational harm . . . and embarrassment."⁵ As seen by Professor O'Neil, the underlying problem is the absence of a recognized legal privilege for research.⁶ Instead of the current ad hoc nature of legal tests that balance the research enterprise against the litigants' need for data, there should be a bright line rule to protect researchers.

Recognizing the absence of such a definitive test, Michael Traynor⁷ suggests the next best alternative—a series of perspicacious preventative measures that

Copyright © 1996 by Law and Contemporary Problems

*Professor of Law, Duke University.

Many thanks to Leslie Bryan, David Bernick, and the Judges of the Mass Tort Litigation Committee of the Conference of Chief Justices. This paper could not have been completed without the assistance of my research assistant Jeff Beaverstock.

1. Robert M. O'Neil, *A Researcher's Privilege: Does Any Hope Remain?*, 59 LAW & CONTEMP. PROBS. 35 (Summer 1996).

2. See Paul D. Carrington & Traci L. Jones, *Reluctant Experts*, 59 LAW & CONTEMP. PROBS. 51 (Summer 1996).

3. O'Neil, *supra* note 1, at 36.

4. Elizabeth C. Wiggins & Judith A. McKenna, *Researchers' Reactions to Compelled Disclosure of Scientific Information*, 59 LAW & CONTEMP. PROBS. 67, 67 (Summer 1996).

5. *Id.* at 75.

6. See O'Neil *supra* note 1, at 37.

7. See Michael Traynor, *Countering the Excessive Subpoena for Scholarly Research*, 59 LAW & CONTEMP. PROBS. 119 (Summer 1996).

would, if utilized in the superbly capable hands of a Michael Traynor, lead inevitably to a *de facto* bright line rule protecting researchers.⁸ His article illustrates adversarial lawyering at its finest and demonstrates that the quality of legal representation does affect outcomes.

Professor Carrington and Ms. Jones, however, find that the existing interpretations of Rule 45 of the Federal Rules of Civil Procedure that permit discovery of nonparty, expert research are fully consistent with the fundamental conception of our adversarial litigation system as a major force in reducing error costs.⁹ In contrast to O'Neil, they postulate a world not of scholars engaged in scholarly enterprise, but one of partisan experts consumed in litigation science.¹⁰ The problem is not one of balancing unreasonable costs and unnecessary disclosures against the rights of litigants; the problem is "the profligate use of opinion evidence at trial."¹¹ Their solution is to reduce the role of partisan experts through the use of Rule 706 of the Federal Rules of Evidence or through the re-characterization of "some matters of scientific opinion as issues of law, not issues of fact."¹² In effect, they raise the much larger issue of what kind of science is litigable—an issue that may be worthy of an entire symposium in *Law and Contemporary Problems*.

Professor Jasanoff also poses a variation of this broader question: What in the end is the best way to integrate scientific knowledge into legal decision-making?¹³ She does so while considering the more narrow issue of how courts should manage the review of subpoenaed research materials so as to advance legitimate skepticism but prevent mindless deconstruction.¹⁴ The mindless deconstruction is "'experimenter regress,' a potentially endless series of questions designed to probe every aspect of the 'failed' experiment, from the reliability of the instruments used to the honesty of the researchers."¹⁵ In the hands of a retained expert, these questions may "highlight areas of ambiguity where multiple approaches and interpretations could peacefully coexist, and may even create a misleading impression of uncertainty where most scientists believe none exists."¹⁶ Professor Jasanoff's argument is that stripping the sociological context of scientific research alters the research itself. Focusing on this issue, which suggests problems similar to those discussed by Professor Carrington and Ms. Jones, and which is similar to the context posited by Professor O'Neil, she suggests four possible solutions:

8. His suggestions include obtaining court orders for protection and stays, and even pushing the contempt envelope. *Id.* at 146-48.

9. Carrington & Jones, *supra* note 2, at 54-63.

10. *See id.* at 55-56.

11. *Id.* at 54.

12. *Id.* at 64.

13. *See generally* Sheila Jasanoff, *Research Subpoenas and the Sociology of Knowledge*, 59 LAW & CONTEMP. PROBS. 95 (Summer 1996).

14. *See id.* at 100.

15. *Id.* at 99 (quoting in part H.M. COLLINS, CHANGING ORDER: REPLICATED INDUCTION IN SCIENTIFIC PRACTICE 2 (1985)).

16. *Id.* at 102.

- (1) screen the party experts who would review the subpoenaed materials;
- (2) appoint an independent expert to assist the court in reviewing the testimony concerning the subpoenaed materials;
- (3) appoint a review panel to review the subpoenaed material; and
- (4) encourage the judge "to develop a keener sense of how science works."¹⁷

Having set forth these various positions, I would like to discuss the O'Neil issue in the context of the Carrington and Jones paradigm: whether or not a bright line test can be devised to control discoverability of nonretained experts' research data when that data is embroiled in active litigation. This discussion will be approached from the perspectives of lawyers and judges embroiled in the heat of the legal maelstrom as it exists in the "real world," where experts are drawn into the litigation precisely because their research has a partisan bite.

This is a world occupied by Judge Crabb. As she indicates, the legal world is different in many respects from the scientific world and, when there is a conflict, it is the law that dominates.¹⁸ "Given the divergent goals of trial lawyers and scientists, it is unlikely that most courts will abandon the usual tools of cross-examination and instead adopt the methods scientists use to test the validity of scientific studies."¹⁹

Judge Crabb agrees with Professor Carrington and Ms. Jones:

It is unlikely that the judge will grant any motion to quash in its entirety unless the researcher establishes the existence of realistic, alternative sources for the subpoenaed information, shows that the information subpoenaed does not have the probative value claimed by the requester, or proffers some other persuasive reason for not complying with the subpoena in any form.²⁰

The requesting party, however, bears the burden of showing that the research is discoverable, and in considering the question the court will take into account the following:

- (1) the needs of the case;
- (2) the possibility that the witness is a unique expert or whether the discovery could be obtained from another source;
- (3) the degree to which the discovery sought is necessary to enable the parties to prepare an adequate case or defense;
- (4) the amount in controversy;
- (5) the limitations on the parties' resources;
- (6) the importance of the issues in the litigation; and

17. *Id.* at 115-17.

18. See Barbara B. Crabb, *Judicially Compelled Disclosure of Researchers' Data: A Judge's View*, 59 LAW & CONTEMP. PROBS. 9, 9-10 (Summer 1996).

19. *Id.* at 13.

20. *Id.* at 31.

(7) whether the discovery is cumulative or duplicative.²¹

As parties requesting research data well know, however, it is easier to allege that these standards have been met than to actually satisfy them. In fact, even judges who lean toward discoverability as a matter of principle often find practical reasons for denying access.²²

Perhaps the most interesting issue in this symposium, however, is not whether discovery will be allowed; Judge Crabb and others have provided us with ample guidance to deal with this issue. The more perplexing question is once allowed, when does the discovery stop? Is there a natural dividing line, or does a slippery slope lead inevitably to uncontrollable discovery? Indeed, many courts deny discovery due to their inability to answer the slippery slope question. If granting discovery of non-retained experts' research data leads to unsolvable future discovery problems, why allow the discovery at all? Carrington, Jones, and Jasanoff suggest that the answer to this problem of destructive discovery lies in increased judicial involvement, either with or without the assistance of a court-appointed expert. I would like to suggest two alternative solutions, both of which are quite modest, but in appropriate cases may be of some assistance to courts.

The first suggestion involves the use of a court-appointed expert with sufficient knowledge of the research area who would not engage the substance of research, but rather provide a "sociological context" and assist the parties in delineating the scope of discovery. The second suggestion entails the application of a surrogate test for the scientific value of the subpoenaed research, one that is well within the competence of the courts and that focuses on the core issue: Is there a litigation taint? But first, it is critical to understand the factual underpinnings of these proposals, that is, how research and discovery are used in the adversarial system, in large part because these factual assumptions may be quite foreign to some researchers.

The following fact patterns raise some of the types of issues concerning discovery of nonretained expert research data that have arisen in the litigation surrounding silicone gel breast implants. The actual facts have been changed and dramatized somewhat—a privilege given to all torts professors—in order to tease out the more thorny problems that are often embedded in complex situations.

Under the first scenario, a defendant manufacturer seeks the entire research—all medical records, notes, drafts, etc.—of a nonretained expert. This expert has written a paper that has not been subjected to peer review but is being used by a retained expert to support that expert's opinion that there is a causal relationship between the product in question and certain specific harms. The defendant further asserts that in a prior case the nonretained expert was prevented from testifying as an expert for the plaintiff when he refused to turn over the requested data to the defendant. A permutation of this scenario

21. *Id.* at 26-27.

22. *See United States v. Allen*, 494 F. Supp. 107 (W.D. Wis. 1980).

would involve a peer-reviewed paper and an expert who had previously testified.

A second scenario involves a noted university based research team that is conducting a study on the relationship between a product and certain harms. The study has been funded by one of the product's manufacturers that is currently the defendant in ongoing litigation and which has secured the right to obtain copies of all of the team's research protocols and data at various stages prior to publication. It is anticipated that the study and its results eventually will be published as a peer-reviewed paper, and there is no expectation that any member of the research team will ever be retained as a party expert. The plaintiffs move the court to obtain access to all materials the defendant receives from the research team at the same time as the defendant receives them. This scenario can be altered with a defendant who has significantly more or less control over the research process.²³

In a third scenario, various physicians who have treated many of the plaintiffs' injuries agree to testify on their patients' behalves in connection with a series of product liability cases involving the allegedly faulty product. These treating physicians turn over anecdotal evidence of their patients' conditions to a nonretained expert who, in turn, completes a study finding a correlation between the product and certain harms. The defendant manufacturer moves the court to obtain all of the medical records and to allow its own physicians to conduct medical examinations of the injured patients. The nonretained expert's study could be peer-reviewed or not according to the desired hypothetical. You might also hypothesize that the underlying lawsuit and subsequent discovery request are filed in a given state court and that the non-retained expert in continuing possession of the medical records resides in another state and the clinicians are scattered all over the country—a hypothetical worthy of a law school examination question even though it is very close to being realistic.

In the final scenario, a defendant manufacturer finances a scholarly study and retains the right to review the data prior to publication. The researcher makes it publicly known that while an abstract has been prepared and published, there will be no peer-reviewed publication of the entire project because of resistance from the manufacturer. The plaintiff requests that the court grant it access to the researcher's data. The possible permutations of this fact situation are exquisite.

These scenarios arise out of quite a different environment than that of scholars engaged in scholarly enterprise as contemplated by Professor O'Neil. Here the lawyers for each side are overtly vying for an adversarial edge as frequently are the researchers themselves. The attorneys are searching for data collection errors, data errors, data corrections, data collected but not used, data susceptible to alternative interpretations—in short, the parade of factors envi-

23. See Orders 36 and 36A, *In re Silicone Gel Breast Implant Products Liability Litigation* (MDL 926), CV 92-P-10000-S (1997) (where Judge Sam C. Pointer, Jr., after the initial draft of this article, ordered reciprocity in production and exchange of information regarding ongoing studies funded by a party to the litigation).

sioned by Carrington, Jones, and Jasanoff. The trial judges, who must ultimately decide whether to grant or deny motions to discover research results, are typically overburdened and understaffed, unlike some of the appellate judges who write the elegant opinions discussed in the other papers in this symposium. More often than not, these trial judges are primarily interested in resolving discovery disputes in the least amount of time possible without having to write an opinion. Indeed, there is little wonder that in virtually all of the actual situations that form the basis for the four hypothetical scenarios, parties reach agreements regarding discovery with some "leverage" applied by the judge.

The first suggested solution to the "when does discovery end?" dilemma involves the use of a court-appointed neutral, either a Rule 706 expert or a Rule 53 special master. As has been discussed elsewhere, the mere presence of a court-appointed expert who is respected by the parties' experts can provide the sociological context discussed by Professor Jasanoff.²⁴ Once the party experts know that their litigation positions are being scrutinized by a knowledgeable neutral, it is not uncommon for their disputes to evaporate. Recognizing that their outlier positions simply will not sustain knowledgeable scrutiny, and seeking to avoid the risk of a court's adverse reaction, they may retreat to a more sustainable position. Mediated discussions may then lead to amiable and acceptable discovery that does not lead to "mindless deconstructionism." For example, in a given case, all computerized data might be turned over to the parties, paid for by the requesting party, but unentered data would remain protected. The parties are induced to draw the line themselves with the aid of the court's expert, as opposed to having it drawn unilaterally by the court or the court's expert. Discovery progresses in a manner that balances the interests of the parties, retains the essence of the adversarial process, and leaves the scientific method unbowed.

The second suggested solution is the use of an initial period of limited discovery to determine whether the adversarial interests of the parties have in any way adversely affected the normal research process. Unless this first stage of discovery reveals that the parties' litigation has had an impact on the research, all further discovery would cease. If, however, this preliminary discovery reveals that a party either supported or influenced the research it seeks to introduce at trial, then mindful deconstruction would be allowed.

The type of preliminary discovery envisioned would include interrogatories to determine, for example, whether there was partisan involvement in the drafting, approving, or altering of the research protocol. Other topics suitable to inquiry during this initial stage of discovery would include the use of data obtained from a partisan source or participation in a partisan activity that would suggest a litigation bias on the part of the researcher. In general, this discovery would seek to either eliminate or substantiate the suspicion that the normally

24. See Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440, 475-78 (1996).

accepted research process was tainted by litigation interests. If a court found that litigation interests invaded the research, then the door would be opened to extensive discovery consistent with the adversarial process.

If courts were to adopt such a two-stage discovery process, it would have a prophylactic effect on future litigation science. Such a bright line rule would provide sufficient predictability that litigants would avoid tainting research so that it would remain legitimate and could be used in court, precisely the goal sought by O'Neil, Carrington, and Jones. At the same time, judges would probably feel comfortable determining whether there had been a litigation motivation inserted into the research, even if they might feel quite uncomfortable in second guessing the quality of the science itself.

Neither of these suggested approaches is a panacea, but each suggests a solution well within the normal competence of courts. Notwithstanding the criticism of courts in coping with scientific evidence in general, most commentators would agree that fostering consensus and judging credibility are generally handled quite well under our existing judicial procedures.